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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STEVEN DUANE JONES,
PETITIONER,

VS.

STATE OF CALIFORNIA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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CALIFORNIA, FOURTH APPELLATE DISTRICT

QUESTIONS PRESENTED

1. Whether Petitioner must pursue his remedy further through a petition for writ of habeas corpus even where the multiple errors of his trial counsel exceed the State's required showing of ineffective assistance of counsel.

2. Whether the cumulative effect of multiple errors by trial counsel requires automatic reversal without a showing of prejudice.

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OPINIONS BELOW

The unpublished opinion by the Court of Appeal, State of California, Fourth Appellate District was filed on December 20, 1984 and was designated as case number G000626. The order denying hearing by the California Supreme Court was filed March 20, 1985. A copy of each document is included as Appendix 1 and 2.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC section 1257(3) on the ground that his rights under the Sixth Amendment to the U.S. Constitution were violated. The instant Petition for Writ of Certiorari is filed within 60 days of the order denying hearing by the California Supreme Court.

CONSTITUTIONAL PROVISION

Amendment VI, provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Steven Jones and a business associate, Arthur Madison, established a mortgage company in Huntington Beach, California, known as Colonial State Mortgage. (A-1,

p. 3-7)[1] The purpose of the business was to provide long term financing to repay construction loans. The customers for the service were developers of small commercial projects who paid an advance fee to Colonial for a loan commitment. (A-1, p. 3)

Jones assumed the administrative duties of the business while Madison solicited loan prospects. Jones located office space, hired secretaries, signed leases and signed the loan commitments. Madison met with clients, made promises about Colonial's services and ability to fund large projects which were shown at trial to be false. (A-1, p. 3-7).

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[1] All citations in parenthesis, other than those referring to cases or statutes refer to the Appendix attached hereto, (A-1 or A-2) or to pages from the proceed-ings in the trial court as follows: Clerk's Transcript (C.T.), Reporter's Transcript (R.T.).

Jones and Madison were jointly charged and tried on one count of grand theft by false pretenses, California Penal Code section 487 (1). This count was based upon an incident involving a commercial developer who had paid a fee to Colonial for a commitment but was thereafter unable to obtain a construction loan for his shopping center. This was because other lenders refused to honor Colonial's loan commitment without further financial verification. The developer requested that Madison either provide verification of Colonial's financial strength or repay the advance fee. Madison was unable to do either. (A-1, p. 4).

At trial, the prosecution presented evidence of the above incident and other transactions of a similar nature which were gathered as a result of a search of Colonial's premises. The prosecution

also introduced as evidence against both Jones and Madison the false statements to clients made by Madison. (R.T. 71-73).

Counsel for Jones objected to the admission into evidence of the false statements of Madison against Jones. The Court admitted the statements subject to a later motion to strike. (R.T. 71-73). The court twice admonished counsel that because of the problem of statements of Madison being admitted against both Jones and Madison, he ought to move for a severance. (R.T. 71-73, 565). Counsel for Jones neither moved for a severance nor sought a later ruling on the statements of Madison.

In addition, counsel for Jones failed to challenge the legality or execution of the search warrant. Testimony by the officer who executed the search of Colonial's premises reveals grounds for

challenge of the warrant as improperly drawn, overbroad and subject to a motion to traverse under California Penal Code section 1529. (R.T. 32-33, 374).

Counsel also failed to investigate the prosecution's discovery materials including the search warrant and the evidence taken in the search of Colonial's premises. (A-1 p. 10-11). The prosecution made the materials available on specified dates but counsel did not appear to inspect the materials. Counsel later discovered grounds to challenge the search warrant when he began trial preparation four days prior to trial. (C.T. 487, declaration of trial counsel). Counsel then made a belated motion for a continuance and to restrict evidence based upon the illegal warrant. The court refused to grant the motions. (R.T. 28, 35-36).

Counsel for Jones also failed to call a business client of Jones who would have given favorable testimony of his prior business experience on behalf of Jones. (R.T. 270-302).

Finally, Counsel for Jones requested and then withdrew instructions to the jury limiting the use of evidence admitted for one purpose or against one defendant. (C.T. 566, 527-528).

On appeal, counsel for Jones raised the issue of ineffective assistance of counsel as being violative of his Sixth Amendment rights. (Appellant's Opening Brief, p. 14, Appellant's Supplemental Opening Brief, p.13, 21.) The Court of Appeal rejected Jones' argument and found that his claims would be more appropriately addressed in a petition for habeas corpus. (A-1, p. 17). Jones petitioned for hearing in the California Supreme

Court based upon his counsel's ineffectiveness. The Petition was denied. (A-2.).

REASONS FOR GRANTING THE WRIT

I.

THE MULTIPLE ERRORS COMMITTED BY COUNSEL FOR PETITIONER EXCEED THE STATE'S REQUIRED SHOWING OF ON-THE-RECORD INEFFECTIVE ASSISTANCE OF COUNSEL.

The California standard for demonstrating ineffective assistance of counsel is set forth in People v. Pope, 23 Cal.3d 412, 423-424 (1979). In Pope, supra, the court held that in raising this issue on appeal, the appellant has the burden of demonstrating:

"...That trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." 23 Cal.3d at p. 425.

The Pope court held that where the record sheds no light on why counsel acted or

failed to act in the manner challenged, the reviewing court must affirm and the aggrieved appellant must make his claim in a petition for habeas corpus where counsel can be asked to explain the acts or omissions.

The court in Pope found that this procedure is not necessary where:

"...counsel was asked for an explanation and failed to provide one, or where there simply could be no satisfactory explanation." 23 Cal.3d at p. 426.

The Court of Appeal, even though presented with a trial record revealing multiple egregious errors, would still require Jones to seek his remedy through a petition for writ of habeas corpus. In its opinion, the court stated:

"Since we are bound by the record on appeal, we can only speculate regarding counsel's tactical choices and decision making process. (citing Pope, supra.) None of the claimed inadequacies can be

resolved on the record before this court. Under these circumstances, Jones' claims of ineffective assistance of counsel are more appropriately addressed in a petition for habeas corpus. (citations)." (A-1, p.17)

The Court of Appeal opinion violates the standard set forth in People v. Pope, supra, in that trial counsel's failings are so numerous and so serious that there simply could be no satisfactory explanation for them.

Petitioner ought not to be made to undergo further expense and litigation to establish what is already apparent from the record. Further proceedings in habeas corpus would duplicate judicial resources and would only show the following errors and omissions which are already clear from the record of the trial:

1. Failure to move for Severance.

When faced with the prejudicial effects

on Jones of the joinder of Jones and Madison, counsel for Jones took no action. The trial court twice advised counsel that he ought to move for a severance, indicating that the court recognized that prejudice to Jones was inherent in the proceedings. When the court questioned counsel as to why he did not move for a severance, he had no comment. (R.T. 71).

At trial both Jones and Madison exercised their Fifth Amendment right to remain silent and neither took the stand. In Bruton V. U.S., 391 U.S. 123 (1968), this Court held that when a codefendant's statement implicates a non-declarant defendant the admission of the statement at trial deprives the non-declarant defendant of his Sixth Amendment right to confrontation.

In the instant case, Madison did not testify so he was not available for full and effective cross-examination. The admission of the statements made by Madison and the lack of opportunity to cross-examine Madison deprived Jones of his right to confront witnesses against him.

2. Withdrawal of jury instructions.

The error of counsel's failure to request severance on behalf of Jones is compounded by counsel's withdrawal of instructions to the jury. Counsel requested and then withdrew California criminal jury instructions, CALJIC numbers 2.07

and 2.09,[2] which advise the jury to restrict evidence to one party or to one purpose. (C.T. 566, 567).

The dangers of a joint trial are considered to be averted by careful instructions to the jury. Opper v. United States, 348 U.S. 84, 95 (1954); U.S. v. Becker, 569 F.2d 951, 964 (1978). In

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[2] CALJIC 2.07 states: Evidence has been admitted as against one of the defendants and not admitted as against the other. At the time this evidence was admitted you were admonished that it could not be considered by you as against the other defendant. You are again instructed that you must not consider such evidence as against the other defendant.

CALJIC 2.09 states: Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. You are again instructed that you must not consider such evidence for any purpose except the limited purpose for which it was admitted.

Becker, supra, for example the court stated:

"The remedy of severance is justified only if the prejudice flowing from a joint trial is clearly beyond the curative powers of a cautionary instruction." (citation). 569 F.2d at p.964.

It cannot be seriously contended that as a matter of good trial tactics a minor participant in a fraudulent scheme would benefit from being jointly tried with the dominant party. It is even less reasonable that good trial tactics would dictate the withdrawal of curative instructions to the jury. There can be no reasonable explanation for these multiple errors on the part of trial counsel other than gross ineptitude.

3,4. Failure to challenge search warrant and failure to move to suppress evidence.

Counsel for Jones began trial preparation only four days prior to trial. At this late date, counsel became aware of grounds to challenge the search warrant as well as grounds to suppress evidence garnered in the search of Colonial's premises. Counsel then moved for a continuance in order to prepare for trial. The court denied the motion since counsel had already had adequate time to investigate the above issues. (R.T. 28, 35-36, C.T. 487).

In addressing another issue in its opinion the Court of Appeal acknowledged counsel's negligence in failing to prepare for trial:

"Our review of the record fails to disclose any claim that evidence was not preserved; rather, trial counsel had simply not taken the time to review all of the materials the prosecution made available for discovery.

mistakenly assumed the evidence would be limited to the Hughes incident, and

therefore had not bothered to follow up on the prosecution;s offer to make available for discovery everything seized pursuant to the search warrant." (A-1, p. 10-11).

5. Failing to call favorable witness.

A former business' associate of Jones appeared at the preliminary hearing and gave favorable testimony on his behalf. When counsel learned that this witness would be unavailable during trial, he made no further effort to present this evidence but merely offered the lame excuse in his declaration that the witness was unavailable. (C.T. 487).

The above claimed inadequacies are apparent on the record in the trial below and exceed the state's required showing of ineffectiveness. It is therefore, a wasteful exercise to require Petitioner to repeat the above showing of counsel's ineffectiveness in another proceeding.

II.

THE CUMULATIVE EFFECT OF MULTIPLE ERRORS BY TRIAL COUNSEL REQUIRES AUTOMATIC REVERSAL WITHOUT A SHOWING OF PREJUDICE.

In United States v. Morrison, 449 U.S. 361 (1980) this Court held that society's interests in the administration of criminal justice must be balanced against the right to counsel in criminal cases. Therefore, in order to warrant a remedy where violations of the right to counsel have occurred, the defendant must demonstrate that prejudice has resulted. 449 U.S. at 364-365.

As described in Cooper v. Fitzharris, 586 F.2d 1325, 1331-33,(9th Cir. 1978), right to counsel cases are separable into two groups: one group in which the harmless error test applies, and a second group in which violation of the right results in automatic reversal of the conviction.

In cases requiring automatic reversal, the trial court record is such that a reviewing court seeking to discern the harmlessness of the right to counsel violation would be forced to engage in "unguided speculation". (Id.)

"When no counsel is provided or counsel is prevented from discharging his normal functions, the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made." (Id.)

By contrast, the harmless error line of cases involve those where:

"the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." Cooper v. Fitzharris, supra, 586 F.2d at 1332.

Taken separately, the errors committed by counsel for Jones fall into the latter category. However, when viewed in totality, the picture is one of complete dep-

rivation of counsel for which no showing of prejudice is necessary.

In Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982), the court held that the pervasive impact of multiple errors requires a different standard of review.

The court stated:

"We cannot, as the state would have us do, view the individual mistakes committed by the petitioner's attorneys in isolation. The record, viewed as a whole, establishes that the defense counsel's overall performance and the cumulative effect of their multiple errors denied Harris effective assistance. 6697 F.2d at 212.

The court in Harris, supra, held that where multiple errors have occurred, the standard of prejudice is automatic reversal rather than harmless error:

"This ineffectiveness so pervaded every aspect of the adversary process in this case that it is impossible to determine accurately the presence or absence of prejudice to Harris. Thus, the burden

must shift to the state to prove that the ineffectiveness of Harris's counsel was harmless beyond a reasonable doubt." 697 F.2d at 212.

The court in Cooper v. Fitzharris, supra, 586 F.2d 1325, 1333 also noted that in multiple error cases, prejudice is likely. The court stated:

"Two cautionary comments are in order. If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense-prejudice may result from the cumulative impact of multiple deficiencies."

In the present case, the overall ineffectiveness of Jones' counsel has had so pervasive an effect on the trial below that it is impossible to determine accurately the presence or absence of prejudice. Therefore, the ineffectiveness in this case requires a reversal of the judgment below and a new trial.

CONCLUSION

For the foregoing reasons, Petitioner requests that this court grant a hearing and reverse the opinion of the reviewing court below.

Dated: May 20, 1985

RESPECTFULLY SUBMITTED,

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No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

STEVEN DUANE JONES, Petitioner,	)
vs.	)
STATE OF CALIFORNIA, Respondent.	)

CERTIFICATE OF SERVICE

I hereby certify that my application for membership in the U.S. Supreme Court bar is presently pending before this court and that on this date I have served a copy of Petition for Writ of Certiorari by depositing it in the U.S. mail, first-class postage prepaid, at Irvine, California, and addressed to:

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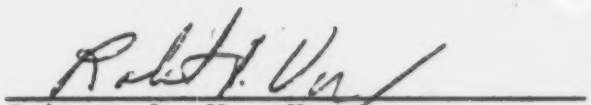
Certificate of Service, p2

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I Further certify that all
parties required to be served
have been served.
Dated: May 20, 1985, in Santa Ana,
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OCTOBER TERM, 1985

STEVEN DUANE JONES,
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STATE OF CALIFORNIA,
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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA, FOURTH APPELLATE DISTRICT

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS
(filed December 20, 1984)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT,

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	
v.	)	G000626
STEVEN DUANE JONES and ARTHUR JAMES MADISON, Defendants and Appellants.	)	Super. Ct. No. C-47602
	)	OPINION

APPEAL from judgments of the Superior Court of Orange County, J.E.T. Rutter, Judge. Affirmed.

Robert A. Van Hoy for Defendant and Appellant Steven Steven Duane Jones.

Office of the State Public Defender, Suzan E. Hier, Deputy State Public Defender, for Defendant and Appellant, Arthur James Madison.

John K. Van De Kamp, Attorney General, Keith I. Motley and M. Howard Wayne, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Duane Jones and Arthur James Madison challenge their convictions of grand theft by false pretenses (Pen. Code, sec. 487, subd.(1)). Both of them admitted a prior felony conviction of grand theft (Pen. Code, sec. 487, subd. (1)). Although their appeals were consolidated, each raises different issues. Jones claims error: (1) in the denial of his motion for acquittal (Pen. Code, sec 1118.1): (2) in the denial of his motion to continue: (3) in admitting evidence of uncharged crimes; and (4) in the court's failure to sever his trial from Madison's sua sponte. Jones also contends he was denied the effective assistance of counsel at the trial and preliminary

examination. Madison claims hearsay evidence was erroneously admitted and argues he was improperly sentenced to an aggravated term.

Madison and Jones formed Colonial State Mortgage Company (Colonial) in early 1980. Jones negotiated a lease for office space and brought in a former business associate, Fred Williams, as another officer. Williams was led to believe the firm would function as a loan brokerage, matching borrowers to lenders. Williams spent minimal time at the office, accomplished little, and was apparently unaware that Madison and Jones were operating a fraudulent mortgage business. Madison had the most contact with clients. Jones was more involved behind the scenes.

Appellants were convicted of grand theft from Terry Hughes. Hughes was the general partner in a limited partnership

attempting to develop a small shopping center in Ventura County. Bank of America agreed to provide a construction loan for the project if Hughes could supply a takeout commitment.[1] Representing Colonial, Madison gave Hughes a written takeout commitment and collected an advance fee of $6.750.00. Bank of America rejected Colonial's takeout commitment and questioned the legitimacy of Colonial. Madison promised to provide Colonial's financial statement to Bank of America. No such statement was ever provided. Bank of America would not fund the project, and Hughes was not repaid the $6,750.00 despite Madison's promise of a refund.

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1 A takeout commitment is a commitment to "take out" the short term construction lender once the project is built by providing permanent long-term financing.

Although appellants were only charged with the Hughes theft, two other disgruntled customers testified. Allen Mosk needed a takeout commitment for a construction loan with Imperial Bank. Representing Colonial, Madison gave Mosk a written takeout commitment in exchange for a $14,000.00 advance fee. Mosk needed Colonial's financial statement which Madison agreed to provide. After many delays, Madison suggested Colonial place a compensating balance on deposit with Imperial Bank in lieu of providing a financial statement. No compensating balance was deposited, no financial state-ment was received, Imperial Bank never accepted Colonial's takeout commit-ment, and Mosk never did receive a refund of his $14,000.00. Although Jones and Madison were originally charged in the information with theft from Mosk, that

charge was set aside under Penal Code section 995.

Maurice Niedens sought a takeout commitment to secure a loan to pay off liens on property he wanted to develop in Kansas. Niedens met with Madison, representing Colonial, in Denver, Colorado. He gave Madison an advance fee of $20,500.00 in exchange for Colonial's takeout commitment. Madison's promise to provide Colonial's financial statement was never fulfilled. Despite repeated requests and a personal trip from Kansas to California, Niedens never got a financial statement or a refund. Jones and Madison were apparently never charged with any offense relating to Niedens.

Huntington Beach police officers searched Colonial's offices pursuant to a warrant. Evidence found in the search was introduced to corroborate the testimony of Hughes, Mosk and Niedens. All of

the evidence supported the conclusion Madison and Jones operated Colonial by falsely representing Colonial's legitimacy and collecting advance fees for takeout commitments, knowing those commit-ments were worthless. Madison made most of the misrepresentations regarding Colonial's length of existence, its non-existent main office in Montreal, and its prior success in providing solid takeout commitments. Jones was intimately involved in the formation of Colonial, in negotiating Colonial's lease, and in covering for Madison.

I.

Jones challenges the sufficiency of the evidence, arguing the trial court erroneously denied his motion for acquittal (Pen. Code, sec. 1118.1). He first argues the prosecution failed to prove Hughes parted with his money in reliance

on any false representation. Next he argues his lack of personal contact with the victim contradicts a finding of knowing participation in a fraudulent scheme.

In reviewing the trial court's denial of a motion for acquittal, we are required to determine whether each element of the offense charged is supported by substantial evidence. (People v. Wong (1973) 35 Cal.App.3d 812, 828). Jones claims an element of theft by false pretenses was not proved because no one could testify with certainty that Bank of America never received a financial statement from Colonial. Viewing the evidence in the light most favorable to the judgment below (People v. Mosher (1969) 1 Cal.3d 379, 395), there is substantial circumstantial evidence establishing no financial statement was ever provided. Moreover, it was an unnecessary fact

since Madison's promise to provide a financial statement was only one of the illusory promises inducing Hughes to pay Colonial an advance fee.

Jones then argues there is insufficient evidence to tie him to Madison's misrepresentations. Substantial evidence supports the conclusion that Jones was intimately involved in the fraud. Jones solicited the participation of Fred Williams, a former business associate, who was unknowlingly installed as a puppet president. Jones induced Williams to provide a written authorization for Jones to sign William's name and fraudulently used that authorization to sign William's name to loan commitments for Hughes, Mosk and Niedens. Since Madison did most of the talking in the actual dealings with Hughes, Mosk and Niedens, Jones claims circumstantial evidence suggests Madison alone perpetrated the

fraud. On review, this court cannot speculate on varying inferences from circumstantial evidence. (Ibid.) We are required to accept the trial court's findings if they are supported by substantial evidence. There is substantial evidence to support Jones' guilt.

II.

Trial counsel for both Jones and Madison made a motion to continue on the grounds of "incomplete discovery" at the commencement of trial. Jones complains the erroneous denial of that motion requires a new trial. He also mistakenly suggests the prosecution failed to preserve evidence as required by People v. Hitch (1974) 12 Cal.3d 641. Our review of the record fails to disclose any claim that evidence was not preserved; rather trial counsel had simply not taken the time to review all of the

materials the prosecution made available for discovery. Trial counsel claimed they were surprised to discover the prosecution intended to call Dr. Niedens as a corroborating witness. In preparing for trial, counsel had mistakenly assumed the evidence would be limited to the Hughes incident, and therefore had not bothered to follow up on the prosecution's offer to make available for discovery everything seized pursuant to the search warrant. We find no abuse of discretion in refusing to grant a continuance for further preparation. Jones' failure to demonstrate any prejudice also precludes any relief. (People v. Laursen (1972) 8 Cal.3d 192, 204).

III.

Jones contends the evidence of the uncharged offenses involving Mosk and

Niedens should have been excluded. Prior to Dr. Niedens' testimony, the trial court conducted a hearing outside the presence of the jury. The court determined the Mosk and Niedens incidents were admissible to show intent in the charged crime.

Jones argues the Mosk and Niedens incidents were not sufficiently similar to the Hughes theft to be admissible. His reliance on People v. Thompson (1980) 27 Cal.3d 303 is misplaced. In Thompson the trial court erred in permitting the prosecution to introduce evidence of an uncharged robbery to prove the defendant had an intent to steal at the time of the charged offense. The Thompson court found the uncharged robbery to be so dissimilar to the charged offenses that its prejudicial effect outweighed any probative value. A review of the record in this case leads to a different conclu-

sion. Madison and Jones conducted themselves in a nearly identical manner in dealing with Hughes, Mosk and Niedens. In each instance, Madison did most of the front work. Nearly identical representations were made to Hughes, Mosk and Niedens to demonstrate Colonial was a legitimate business with a proven record and financial strength which could be documented. The trial court did not abuse its discretion in admitting evidence of the Mosk and Niedens incident. (People v. Haston (1968) 69 Cal.2d 233).

Jones urges this court to find the trial court erred by not informing the jury that charges relating to Mosk had been dismissed pursuant to Penal Code section 995. However, the evidence was not offered nor was any special instruction requested. Moreover, evidence of the dismissal was inadmissible. Jones'

reliance on People v. Griffin (1967) 66 Cal.2d 459 is misplaced. In Griffin, the trial court erred in excluding evidence of defendant's acquittal on an unrelated rape charge. The uncharged rape was admitted to show intent in the charged offenses. Evidence of the acquittal was offered to rebut the prosecution's theory that the uncharged rape showed defendant's intent in the charged offenses. Unlike an acquittal, a dismissal under Penal Code section 995 is not a determination of guilt or innocence. Thus it has little probative value and would be inadmissible under section 352 of the Evidence Code. [2]

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2 Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

IV.

Jones next complains he should have been tried separately from Madison. Since no severance motion was made, he claims a severance should have been ordered on the court's own motion. The great weight of authority holds failure to request a severance constitutes a waiver of the issue. (People v. Santo (1954) 43 Cal.2d 319, 332; People v. Gonzales (1970) 4 Cal.App.3d 593, 604; People v. Martin (1971) 17 Cal.App.3d 661, 671.) People v. Patino (1979) 95 Cal.App.3d 11, 32, suggests a sua sponte obligation to order separate trials may exist and reversal may be required if the appellant can show an abuse of discretion. As in Patino, no such showing has been made. In fact, Jones cites no cases, and we find none, where reversals were ordered based on a trial court's

failure to, sua sponte, order a severance.

V.

Jones argues he was denied effective assistance of counsel at both the trial and preliminary examination. Since his Penal Code section 995 motion did not raise the issue, any complaint regarding the effectiveness of counsel at the preliminary examination is not cognizable in this appeal, unless Jones makes a substantial showing of resultant prejudice at the trial. (People v. White (1981) 118 Cal.App.3d 767, 773.) No such showing has been made.

Jones claims he was denied the effective assistance of counsel at trial because trial counsel: (1) failed to move for a separate trial; (2) failed to move to suppress evidence; (3) failed to move to quash or traverse the search

warrant; (4) failed to call a defense witness who had testified at the preliminary examination; and (5) made a serious omission in withdrawing certain previously offered jury instructions.[3] Since we are bound by the record on appeal, we can only speculate regarding counsel's tactical choices and decision making process. (People v. Pope (1979) 23 Cal.3d 412, 426.) None of the claimed inadequacies can be resolved on the record before this court. Under these circumstances, Jones' claims of ineffective assistance of counsel are more appropriately addressed in a petition for habeas corpus. (Ibid.; see also People v. Hall (1980) 28 Cal.3d 143, 158.).

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[3] Jones also suggests counsel should have made a motion to exclude evidence under People v. Hitch (1974) 12 Cal.3d 641. As previously noted, however, no evidence was lost or destroyed.

VI.

Madison contends the judgment should be reversed because of the improper admission of hearsay evidence. His complaint is base on the lack of a proper foundation for business records. Colonial's telephone bills, monthly bank statement, canceled checks and telephone messages were admitted into evidence without the foundation required by Evidence Code section 1271. Specifically, there was no testimony regarding the identity of the documents nor their mode of preparation. Although timely hearsay objections were made, the trial court's reluctance to rule on the objections results in a confusing record. Nevertheless, we find Madison's objections adequately preserved the issue on appeal, despite respondent's argument to the contrary.

A literal reading of Evidence Code section 1271 requires a detailed foundation for establishing the admissibility of business records sufficient to overcome any hearsay objection. However, certain types of records are almost self-authenticating. In People v. Dorsey (1974) 43 Cal.App.3d 953, bank records were admitted despite the lack of testimony as to their mode of preparation. The absence of the testimony did not affect the record's trustworthiness since the method of preparing bank statements is common knowledge.

The reasoning of Dorsey is equally applicable here. The foundation for Colonial's telephone bills, monthly bank statements, cancelled checks and telephone messages can be inferred from the circumstances. In any event, any claimed error would be harmless under People v Watson (1956) 46 Cal.2d 818. The records

were cumulative to other testimonial evidence and did not independently contribute anything significant to the prosecution's case.

VII.

Finally, Madison argues the trial court relied on improper factors in choosing the aggravated term for grand theft. Madison claims the trial court relied on the following four factors in deciding to impose the aggravated term: (1) he was a career criminal; (2) the victim was particularly vulnerable because he was "desperate;" (3) the crime was sophisticated; and (4) he was in a position of dominance in the crime. Madison concedes the record supports the trial court's characterization of him as a career criminal. He claims the other three factors are not supported by the record.

The evidence is insufficient to support a finding that Hughes was "particularly vulnerable" within the meaning of California Rules of Court, rule 421 (a) (3). Hughes was in fact "desperate" to fund his construction project. However, the totality of the circumstances suggests his desperation was based on a desire to make money. We fail to see how Hughes' position made him "particularly vulnerable" compared to any other victim of a fraudulent scheme. In the context of fraud, "particular vulnerability" is more appropriately found where the victims are cheated out of their life savings or a charitable organization is defrauded. (See, e.g., People v. Simon (1983) 144 Cal.App.3d 761.) Hughes still owned the property at the time of sentencing and had been unable to fund his shopping center project from any other source. We conclude

the court erred in characterizing the victim as particularly vulnerable.

Nevertheless, we agree with the trial court's assessment of the crime as "sophisticated" and therefore premeditated, within the meaning of California Rules of Court, rule 421 (a) (8). Colonial had no apparent legitimate business. Office space was leased, secretaries hired, bank accounts opened and advertisements placed -- an entire business was created -- to fulfill the fraud. The facts support the trial court's finding of sophistication in the sentencing context.

We also conclude the trial court did not rely on Madison's position of dominance in the crime as a factor in aggravation. The prosecution specifically requested the court not make that

finding. Although the court questioned the prosecutor's judgment in that regard, it did not rely on Madison's position of dominance in choosing the upper term.

Only one of the three factors utilized by the court in imposing the aggravated term is not supported by the record. Remand for resentencing would be futile since there is not a reasonable probability Madison's sentence would have been different in the absence of the court's erroneous reliance on the vulnerability of the victims. (People v. Mixon (1982) 129 Cal.App.3d 18, 139.) Any single factor may justify the upper term. (People v. Covino (1980) 100 Cal.App.3d 660, 670.)

The judgments of conviction as to both Madison and Jones are affirmed.

/s/ WALLIN

WALLIN, Acting P.J.

WE CONCUR:

/s/ SONENSHINE

SONENSHINE, J.

/s/ CROSBY

CROSBY, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAR 20 1985

I have this day filed Order _____

HEARING DENIED

In re: _____ *No.* G000626

PEOPLE

vs.

STEVEN DUANE JONES ETC.

Respectfully,

Clerk

84 22962

APPENDIX 2